IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION NO.462 OF 2003
IN
COMPANY PETITION NO.619 OF 2002

In the matter of winding-up ISIBARS Ltd.

Commerzbank AG ..Applicant.

Mr.Pravin Samdani i/b Wadia Ghandy & Co. for applicant.

Mr.Palkhiwala i/b U. & Udeshi for respondent.

CORAM: A.M.KHANWILKAR,J

DATE : AUGUST 5, 2005.

P.C. :

1. Heard counsel for the parties.

2. By this application, applicant-original petitioner in Company Petition No.619 of 2002, prays that provisional liquidator be appointed in respect of the respondent company. The circumstances, in which this relief is sought is spelt out in paragraph- 18 of the affidavit in support which reads thus:

> "18. I say that HSBC also handed over to the Applicant, a copy of the minutes of the last meeting held between the

Consortium Banks and the Respondents dated 19th February, 2003. From a perusal of the said minutes, it appears that :

(a) the Respondents on their own admission have been making preferential payments to some of its creditors and that they are in the process of making payment of Rs.3.2 crores to ICICI and Rs.1.42 crores to HSBC, HDFC Bank Ltd. and Punjab & Singh Bank Ltd.(P & S Bank) in the present financial year;

(b) for the period 2001-2002, the respondents have incurred loss of Rs.52 crores and for the year 2003 they are expecting to make profit of Rs.10 crores before providing for interest and tax;

(c) Exim Bank Ltd has obtained a

decree against the Respondents for a sum of Rs.28 crores;

(d) The respondents have represented to the Consortium Banks that the suit filed by the Applicant in DRT will be dismissed as the Applicant are no longer a banking company.

(e) Dena Bank, HSBC and P & B have already filed suits in DRT against the Respondents;

(f) If the restructuring package did not go through then the Respondents would make a reference to BIFR as 50% of its net worth is already eroded."

It is the case of the applicant that there has been a substantial erosion in the security cover available to the company on account of the adverse overdue position and the inadequate stock and book debts position to cover the outstanding. To support this

case, reliance is placed on overseas report of CDR appended to the reply affidavit, filed on behalf of the respondent company. The said report makes reference to the exposure of Institutions (Term Lenders) as on March 31, 2003 of the respondent company, which appears to be in the ratio of Rs.1,928.9 Million(around 192 crores). The exposure of working capital Bankers as on 31st March, 2003 of the respondent company is Rs.621.4 Million(arround Rs.62 crores). Financing Agencies outside the purview of CDR and amount outstanding thereof is stated to be Rs.713.7 Millions (around 71 crores). Reference is also made to the list of legal cases filed against the respondent company mentioned in annexure-I in the report as well as to the balance-sheet and account summary which annexure-II in the report, to contend that there is substantial erosion in the security cover of the respondent company. Reliance is also placed on the details mentioned in Annexure III of the above said report, which refers to the security position of Term Lenders who are party to the Debtor-Creditor Agreement executed on 10th November, 2003. Reference is also made to the negative covenants of the Debtor-Creditor agreement date 10th November, 2003 at page 48 and the declaration under section 9 of the agreement that the

company agrees not to make any reference to the concerned state government for declaring it as relief undertaking or initiate any legal proceedings for its winding up, merger etc during Workout or implementation of the Approved Restructuring Scheme without the prior approval of the CDR Empowered group. According to the applicants, on the one hand, such declaration is made in the Debtor-Creditor agreement executed on 10th November, 2003 and soon thereafter, on 27th November, 2003, Board of respondent company had taken decision that reference to BIFR be made as the net worth of the company had eroded. Thus according to the applicant, reference to the BIFR is made, so as to deny the claim of the present applicant which is already filed on 10th October, 2003. Besides, the reference is made inspite of the statement made before this court on 14th October, 2003 the counsel appearing on behalf of the respondent company that the company will not approach the BIFR under the Act 1985 without prior permission of this court. According to the applicants, the attempt of the respondent is to favour some of the creditors, selectively, amongst other, leaving out applicants who are entitled to receive over Rs.13 crores from the respondent company. Reliance is placed on the decision of our

High Court reported on the decision of our High Court reported in **1994 (Vol.91) Company Cases 805, in the case of Darshan Anilkumar Patel V/s. Gitaneel Hotels Pvt.Ltd. & Ors..** Emphasis is placed on the exposition at page 819, where this court has culled out some of the situations under which relief of appointment of provisional liquidator ought to be granted. Reliance is placed on the clauses (a), (b) and (e), which read thus :

> (a) where the company is virtually insolvent or the substratum of the company has disappeared and a strong prima facie case is made out;
>
> (b) where the assets of the company are in jeopardy;
>
> (e) public interest;

According to the applicants, all the above three situations are attracted in the present case, which would warrant relief as prayed in the present application for appointing provisional liquidator.

3. On the other hand counsel for the respondent

company contends that the applicants are the only creditor who is wanting appointment of provisional liquidator in respect of the respondent company. Whereas the other 12 lenders have already signed the Debtor-Creditor Agreement as per the approved proposal of CDR dated 10th November, 2003. The proposal has been approved by the CDR on 24th February, 2003. It is stated that the respondent company has already started paying the concerned lenders in terms of the said understanding and approved proposal by CDR. It is further stated that the respondent company is a growing concern and after the proposal is approved by the CDR, things have changed for Debtor and the respondent company has been able to discharge its obligations to the other creditors, who are party to the agreements. In so far as, the HDFC Bank is concerned, it is stated that separate agreement on the same terms as per the approved proposal by CDR has been entered into and even that is being given effect to. The only left out lenders are HSBC Bank and the applicants herein. In so far as the applicants are concerned, the debt amount payable to the applicants is in the ratio of less than 3%, whereas lenders having debt ratio of over 86.4% have already accepted approved proposal of CDR. Besides, it is contended that there are more

than 400 direct workers of the respondent company and over 1000 other persons drawing sustenance from the respondent company. Besides, the respondent company substantially contributes to the foreign exchange. Accounts position as is placed on record, contends the learned counsel for the respondent, would indicate that financial condition of the respondent company is progressing smoothly and is achieving anticipated target. Reliance is placed on the decision of Madras High court in the case of **Sree Aravindh Steel (P) Ltd. V/s. Trichy Steel Rolling Mills Ltd., 1992 Vo.73 company cases, 607,** wherein it is observed that if serious and irreversible damage would be caused to the respondent company, if the prayer for appointment of a provisional liquidator is acceded to. Reliance is also placed on the decision of the **Madhya Pradesh High Court in the case of** K.**P.Mishra & Ors. V/s. Medwin Laboratory P.Ltd. &** Ors. reported in 1988 Vol.63 company cases 810, which has considered the circumstance which should warrant appointment of provisional liquidator. It is observed in this decision that appointment of provisional liquidator is a drastic measure and should not be resorted to except in special circumstances. The company in question should be shown to be insolvent or unless the petition is

prosecuted by the company itself or the relief is not opposed by the company. It is further observed that provisional liquidator is not generally appointed before hearing of the petition. Reliance is also placed on the decision of the Apex court in the case of **Rishabh agro Industries Ltd. V/s. P.N.B.Capital Services Ltd., (2000) 5 Supreme Court Cases 515** to contend that section 15 of the Act, 1985 cast statutory duty on the board to make reference to BIFR if the circumstances so warrant and are permissible by law. If the board has taken informed decision on 27th November, 2003, which is subsequent to the filing of the present application by the applicants in this court, that would not preclude the respondent company in particular, the board of directors of the company to make reference to the BIFR, if the fact situation so warrants. On the above basis, it is contended that the application for appointment of provisional liquidator ought to be rejected.

4. In so far, the legal position as to the circumstances in which the provisional liquidator can be appointed is no more res integra. Reference is rightly made to the Darshan Patel’s case(supra). That decision has culled out some of the situations in which remedy of provisional liquidator may be

invoked. The applicants are relying on clauses (a), (b) and (e) already reproduced above. The question however is, whether in the fact situation of the present case, it would be appropriate to accept the request of appointment of provisional liquidator in respect of company. In my opinion, the answer should be in the negative. This is so because, as it is rightly contended on behalf of the respondent that out of 16 lenders bank, 12 banks have already agreed for restructuring arrangement, which has been duly approved by the CDR. In addition, the HDFC bank who is not a party to the Debtor-creditor agreement executed between the respondent company and 12 lenders bank has also agreed to the arrangement and subsequently entered into separate agreement with the respondent company. All these banks have generally accepted the situation that the respondent company is a going concern and the possibility of restructuring is more than evident. The accounts position has been considered by all these banks and fresh report issued by the ICICI bank would also support this position. Besides, as is rightly pointed out, the lender banks who are supporting restructuring of respondent company, hold 86.4% of the debt ratio; Whereas the amount payable to the applicants herein is not exceeding 3% of the debt ratio. Besides the

arrangement, which has been approved is not demonstrated to be unfair or impermissible. I am in agreement with the submission canvassed on behalf of the respondent company that in such a situation by virtue of section 557 (1)(a) of the Companies Act, the court would consider the prayer of the applicants with utmost circumspection. In other words, majority of the creditors in respect of the respondent company, are supporting the cause of the respondent company by restructuring; and as is rightly pointed out, the respondent company is a going concern with more than 400 workers in direct employment with the respondent company and over 1000 other persons drawing sustenance from the respondent company. It is the case of the respondent company that it is contributing to Nation's foreign exchange to the extent of Rs.22 Crores per annum. Taking all these circumstances, in my opinion, it will not be just, proper and equitable to appoint provisional liquidator in respect of the respondent company. Such a drastic order will not be warranted in the fact situation of the present case. Viewed in this perspective, in my opinion, even if, the applicants may have grievance that they are being left out in preference to some of the creditors selectively by the respondent company, that by itself cannot be the

ground for appointment of provisional liquidator. I find force in the argument canvassed on behalf of the respondent company that applicants are not willing to consider the proposal or package which has been approved by the CDR. Respondent company is willing to offer the same package to applicants herein which however, has not been availed by the applicants. In that sense, it is not a case where the respondent company is trying to dispose of the property or assets of the company, so as to apprehend that the company was attempting to defeat the claim of the applicants. Therefore, prayer in this application for appointment of provisional liquidator will have to be rejected.

5. That however, does not mean that the applicants are not entitled to for the limited relief which is sought in terms of prayer clause (b), so as to restrain the respondent Company and its Director, Manager, Agents, Servants, Officers, and employees from disposing or parting with possession, alienating, transferring or selling or mortgaging/encumbering or creating third party rights on any of the movable or immovable assets and/or properties and investments or any part thereof which are already mortgaged/hypothicated except to deal

with those assets and properties in usual course of business. This limited relief granted to the applicants will serve the purpose of the applicants and at the same time, will not interfere with the day to day business of the respondent company.

6. Accordingly, the application is allowed partly only to the limited extent referred to in the foregoing paragraph.

7. At this stage, counsel for the applicants prays that operation of this order be stayed for a period of four weeks to enable the applicants to take up the matter in appeal, if so advised. As the statement made on behalf of the respondent company has been operating since October, 2003, I see no reason to decline this request. Accordingly, the respondent company will be bound by the statement made on 14th October, 2003 for a period of six weeks from today.